

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re F5 NETWORKS, INC. DERIVATIVE
LITIGATION.

Master File No. C06-794RSL

ORDER CERTIFYING QUESTION TO
THE WASHINGTON STATE
SUPREME COURT

On May 20, 2008, the Court ordered the parties in this case to show cause why the Court should not certify a question asking the Washington State Supreme Court to provide the substantive standard establishing when demand is excused under RCW 23B.07.400(2) in a shareholder derivative action against a Washington corporation. See Dkt. #92 (Order to Show Cause). The individual defendants who responded to the order, and nominal defendant F5 Networks, Inc. (“F5”), do not oppose certification. See Dkt. ## 94, 95, 97. Plaintiffs assert in response that certification is unnecessary because: (1) the Washington State Supreme Court, if asked, would likely adopt Delaware’s demand futility standard; and (2) the “case could be mooted by future events” given that F5 might appoint a special litigation committee that would “likely seek to terminate and/or otherwise resolve the pending action.” See Dkt. #96 at 1, 4-5. Plaintiffs’ primary objection, however, is delay. Id. at 5 (“[S]ignificant amounts of public and private resources can be conserved by deciding the pending motions to dismiss without certifying the proper pleading burden for futility of demand to the Washington Supreme

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1 Court.”).

2 The Court finds plaintiffs’ arguments in response to the Order to Show Cause unavailing.
3 First, as set forth in the Court’s Order to Show Cause, the extent to which the Washington State
4 Supreme Court follows Delaware law on the issue of demand futility is an open question. See
5 Dkt. #92 at 3-7. Second, speculation by the plaintiffs that future actions might moot issues in
6 this case does not affect the threshold, and potentially dispositive, issue of demand futility
7 pending before the Court. See Dkt. #80 (F5’s Motion To Dismiss Amended Complaint For
8 Failure To Make Demand). Finally, while the certification process will cause some delay in this
9 case, the procedure serves the two broader judicial interests of efficiency and comity: as noted
10 by the United States Supreme Court, in the long run certification saves “time, energy and
11 resources and helps build a cooperative judicial federalism.” Lehman Bros. v. Schein, 416 U.S.
12 386, 391 (1974). And, for the reasons set forth in the Court’s Order to Show Cause, the Court is
13 of the opinion that certification is necessary under RCW 2.60.020 to ascertain, as a matter of
14 first impression, Washington’s substantive standard for establishing when demand is excused
15 pursuant to RCW 23B.07.400(2) in a shareholder derivative action against a Washington
16 corporation.

17 Therefore, the Court respectfully certifies the following question to the Washington State
18 Supreme Court:

19 “What test does Washington apply to determine whether allegations made pursuant
20 to RCW 23B.07.400(2) by a shareholder seeking to initiate derivative litigation on
21 behalf of a Washington corporation excuse that shareholder from first making
demand on the board of directors to bring that litigation on behalf of the
corporation?; and

22 If Washington follows Delaware’s demand futility standard, does it also follow the
23 reasoning of Ryan v. Gifford, 918 A.2d 341 (Del. Ch. 2007) in cases where the
improper backdating of stock options has been alleged?”

24 The Court does not intend its framing of the question to restrict the Washington State
25 Supreme Court’s consideration of any issues that it determines are relevant. If the Washington
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1 State Supreme Court decides to consider the certified question, it may in its discretion
2 reformulate the question. See, e.g., Keystone Land & Dev. Co. v. Xerox Corp., 353 F.3d 1093,
3 1098 (9th Cir. 2003).

4 The Clerk of Court is directed to submit to the Washington State Supreme Court certified
5 copies of this Order, a copy of the docket in the above-captioned matter, and Dkt. ## 1, 37, 39,
6 49, 50, 53, 54, 59, 60, 67, 69, 74, 80, 81, 84, 86, 87, 89, 90, 92, 94-97. The record so compiled
7 contains all matters in the pending cause deemed material for consideration of the local law in
8 question certified for answer. See RCW 2.60.010, 2.60.030.

9 The matter is hereby STAYED pending the Washington State Supreme Court's decision
10 whether it will accept review, and if so, receipt of the certified answer to the certified question.

11 If the Washington State Supreme Court accepts review of the certified question, the Court
12 designates F5 as the party to file the first brief under RAP 16.16(e)(1). The Clerk of Court shall
13 notify the parties as soon as possible, but no more than three days, after the above-described
14 record is filed with the Washington State Supreme Court. The parties are referred to RAP 16.16
15 and RCW 2.60.030 for additional information regarding the procedure before the Washington
16 State Supreme Court.

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18 DATED this 3rd day of July, 2008.

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21 Robert S. Lasnik
22 United States District Judge
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